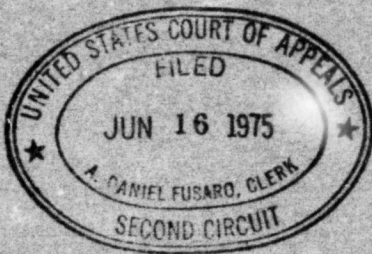


***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF



75-2045

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
GEORGE KING,

Appellant,

-against-

HON. THEODORE SCHUBIN, Superintendent,
Ossining Correctional Facility,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Lasker, J.) dated October 22, 1974 dismissing a petition for writ of habeas corpus following a review of a Magistrate's report and the transcript of trial.

Questions Presented

1. Was appellant deprived of the right to effective assistance of counsel?
2. Was appellant deprived of the right to a fair trial?

Prior Proceedings

On May 12, 1972 at a term of the Supreme Court, Kings County (Mangano, J.) appellant was sentenced to state prison for a maximum term of 5 years after being convicted of the crimes of attempted robbery in the second degree and attempted grand larceny in the third degree by the verdict of a jury. The judgment of conviction was affirmed 41 A D 2d 1027. Leave to appeal to the New York Court of Appeals was denied.

The material facts are set forth in the Magistrate's Report which appears in the Appendix for Appellant. At the beginning of the trial appellant was represented by a staff attorney of the Legal Aid Society. After prosecution had made its opening statement to the jury appellant requested the Court to assign another attorney. There was nothing shown to the court that the attorney already assigned was incompetent or that he was not protecting appellant's legal rights. The adjournment was apparently sought for the purpose of delay.

Accordingly the trial judge denied the request and inquired whether appellant wished to continue with his assigned counsel or to proceed pro se. After conferring with counsel appellant informed the court that he wished to proceed pro se with the attorney available for giving him advice.

The record indicates that the prosecution had a very strong case. Appellant was apprehended by two police officers while his hand was still caught in a Taxi window that had been rolled up by the driver. The driver testified that appellant attempted to rob him through the window by putting a pistol to his head. The pistol was found by the officers on the floor of the taxi where the driver said it had fallen from appellant's hand.

Appellant cross-examined the complaining witness, and the two arresting officers. Following a weekend adjournment of the trial he sought to recall these witnesses. The Court denied the request on the ground that each proposed question concerned a subject which had been covered or was irrelevant.

During the cross-examination of Detective Sullivan, appellant requested that counsel handle the case and the request was granted. During the summation to the jury the trial judge directed counsel not to comment on the presumption of innocence and the requirement that guilt be proved beyond a reasonable doubt.

POINT I

APPELLANT WAS NOT DEPRIVED OF
THE RIGHT TO THE EFFECTIVE
ASSISTANCE OF COUNSEL.

Appellant claims that the trial court's refusal of his request to remove assigned counsel and to substitute new assigned counsel violated his constitutional rights. Appellant's request for assignment of another attorney was made after the jury had been selected and while the trial was in progress. The request for other counsel was apparently made for the purpose of delay. There was nothing to show that assigned counsel was not protecting his rights. Under these circumstances, the refusal to assign other counsel was within the exercise of the court's discretionary powers. United States ex rel. Testamark v. Vincent, 496 F. 2d 641, 643 (2d Cir. 1974) ("All that he did was to complain of lack of frequent visitation and to express a desire to have other counsel"), cert. den. 95 S. Ct. 1685.

Appellant claims that he lacked complete confidence and trust in his lawyer. Where an accused lacks confidence in counsel he has on unqualified right to defend himself. United States ex rel. Maldonado v. Denno, 348 F. 2d 12, 15 (2d Cir. 1965), cert. denied 384 U.S. 1007 (1966). The court was obliged to permit him to proceed pro se for most of the trial.

Appellant claims that he was not versed in the art of cross-examination and that he could not phrase his questions in a manner that would satisfy the court. As stated he chose to defend himself. Thereafter counsel was ready to step back into the case, and near the end of the People's case counsel did step back at appellant's request. Prior thereto appellant's decision to proceed pro se constituted a waiver of the right to counsel. United States ex rel. Testamark v. Vincent, supra pp. 643-644.

There is no claim that counsel's assistance was of a kind as "to shock the conscience of the Court and make the proceedings a farce and mockery of justice" as is required for showing that an accused has been deprived of the effective assistance of counsel. United States v. Currier, 405 F. 2d 1039, 1043 (2d Cir. 1969), cert. denied 395 U.S. 914; United States ex rel. Crispin v. Mancusi, 448 F. 2d 233, 237 (2d Cir. 1971); United States v. Wight, 176 F. 2d 376 (2d Cir. 1949), cert. denied 338 U.S. 950; United States ex rel. Marcelin v. Mancusi, 462 F. 2d 36, 42 (2d Cir. 1972); United States v. Yanishefsky, 500 F. 2d 1327, 1333 (2d Cir. 1974).

POINT II

APPELLANT WAS NOT DEPRIVED OF
HIS RIGHT TO CONFRONT THE
WITNESSES AGAINST HIM; MOREOVER,
THE TRIAL COURT'S RESTRICTION ON
DEFENSE COUNSEL'S SUMMATION DID
NOT DEPRIVE HIM OF THE RIGHT TO
A FAIR TRIAL.

Appellant contends that the court's refusal to permit him to recall three witnesses for further examination deprived him of his constitutional right to confront and cross-examine the witnesses against him. The trial court refused his request to recall the prosecution witnesses on the ground that the proposed questions had already been asked or were not pertinent to the issues (A-18-20). The court's ruling was within the scope of its broad discretionary powers to control the scope of cross-examination. United States v. Houlihan, 332 F. 2d 8, 15 (2d Cir. 1964); United States v. Bowe, 360 F. 2d 1, 14 (2d Cir. 1966). United States v. Pacelli, 491 F. 2d 1108, 1120 (2d Cir. 1974); Smith v. Illinois, 390 U.S. 129, 132 (1968); United States v. Jenkins, 510 F. 2d 495, 500 (1975).

Appellant contends that the trial judge's direction to defense counsel not to comment on the presumption of innocence and the requirement that guilt be proved beyond a reasonable doubt prevented counsel from delivering an effective summation. As the District Judge noted the trial court itself charged the jury on these subjects. Therefore the trial court's restriction on defense counsel's summation did not deprive appellant of his right to a fair trial. Cf. United States ex rel. Smith v. Montanye, 505 F. 2d 1355, 1359 (2d Cir. 1974).

CONCLUSION

THE ORDER APPEALED FROM SHOULD
BE AFFIRMED.

Dated: New York, New York
June 13, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
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State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
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BURTON HERMAN
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MAGDALINE SWEENEY , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Appellee
herein. On the 17th day of June , 1975 ,s he served
the annexed upon the following named person :

ROBERT LEIGHTON, ESQ.
Attorney for Appellant
15 Park Row
New York, New York 10038

Attorney in the within entitled appeal by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Magdaline Sweeney

Sworn to before me this
17th day of June , 1975

Burton Kerman
Assistant Attorney General
of the State of New York